Supreme Court, U.S.
FILED
93-1036 DEC 20 1993

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

JOHN W. SELCH,

Petitioner

v.

CHRISTINE W. LETTS, in her official capacity as the Director of the INDIANA DEPARTMENT OF HIGHWAYS; DANIEL A. NOVRESKE, in his official capacity as the Chief Deputy Director of the INDIANA DEPARTMENT OF HIGHWAYS; ROBERT D. BOXELL, in his official capacity as the Chief of the Personnel Services Division of the INDIANA DEPARTMENT OF HIGHWAYS; and FREDERICK GLASS, in his official capacity as the Governor's Executive Assistant for Transportation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Peter G. Tamulonis
Counsel of Record
John B. Drummy
Briane M. House
KIGHTLINGER & GRAY
660 Market Square Center
151 North Delaware Street
Indianapolis, IN 46204
(317) 638-4521
Counsel for Petitioner

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Seventh Circuit opinion in this case conflicts with the Fourth Circuit Court of Appeals' opinion in Akers v. Caperton, 998 F.2d 220 (4th Cir. 1993).

2. Whether the decision below raises significant and recurring problems concerning political affiliation as an appropriate requirement for a position which is within a classic bureaucratic model, whose responsibility and discretion are substantially cabined by the goals, policies, procedures, and guidelines of superiors within the bureaucracy.

3. Whether discharge on the basis of partisan politics from public employment which does not include room for the legitimate exercise and discretion based upon partisan politics, in which the only threat to in-party objectives would result from insubordination or poor job performance or some other conduct which would constitute cause for discharge, contravenes First Amendment rights to freedom of speech and association as guaranteed through the Fourteenth Amendment to the United States Constitution.

PARTIES TO THE JUDGMENT BELOW

All parties to the proceedings in the Court whose judgment is sought to be reviewed are identified in the caption.

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The Petitioner, John W. Selch, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 21, 1993.

OPINION BELOW

The opinion of the Court of Appeals is reported as Selch v. Letts, 5 F.3d 1040 (7th Cir. 1993).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 21, 1993. No petition for rehearing was filed. This petition for certiorari is filed within ninety (90) days of the date of judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The jurisdiction of the District Court was based on 28 U.S.C. §§ 1331 and 1343. Selch alleged violation of rights secured to him by the first and Fourteenth Amendments to the United States Constitution and claimed a right to relief under 42 U.S.C. § 1983. The jurisdiction of the Seventh Circuit was pursuant to 28 U.S.C. § 1291, on an appeal from a final judgment that disposed of all issues as to all parties.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. Amend. XIV, § 1

All persons born or naturalized in the United States,and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

John W. Selch filed a civil rights action (42 U.S.C. § 1983) against Defendants claiming that he was discharged on the basis of partisan politics in violation of his First Amendment rights to freedom of speech and association as guaranteed through the Fourteenth Amendment.

Mr. Selch held the position of Subdistrict Superintendent for the Indiana Department of Highways.[1] Selch contended that his termination was politically motivated and that the position of Subdistrict Superintendent did not come within any of the exceptions to the so-called Elrod/Branti doctrine prohibiting politically motivated discharges of public employees.

A Subdistrict Superintendent is responsible for the maintenance of the roads within his subdistrict. In Indiana there are thirty-seven subdistricts which blanket the entire state. The Superintendent has no role or responsibility regarding new construction. The Superintendent's goals, maintenance program, objectives, and policies are formulated by the department central office and handed down through the departments "Departmental Policies Manual," "Field Operations Manual", and the "Maintenance Management System". (Exhibits Nos. 52, 49). The purpose of the Maintenance Management System is to assure effective, efficient, safe highway maintenance operations, with uniformity throughout the state. (Exhibit No. 49).

The position is on the lower end of the hierarchy in a classic bureaucratic model. There are five levels of management above the position and only one level between the Subdistrict Superintendent and manual laborers. The responsibility and discretion inherent in that position is closely cabined by the goals, policies, and procedures established by superiors in the bureaucratic hierarchy. There is no room for the legitimate injection of partisan politics into job performance.

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[1] Through Legislation effective in 1989, other state transportation functions were merged with the old Indiana Department of Highways. The emerging entity was renamed the Indiana Department of Transportation. Hereinafter, for ease of reference, the governmental unit dealing with highways is simply referred to as the "Department". Further, as a part of this restructuring, the Subdistrict Superintendent position was renamed "Subdistrict Manager". The District Court found that this retitling of position was not relevant to consideration of the case. The Seventh Circuit Court of Appeals likewise found "that the change in title [of the Department] is of no significance . . . ." Selch v. Letts, 5 F.3rd 1040-1041, fn. 1; 1042, fn. 2.

The District Court found that Mr. Selch's job did not entail meaningful input into government decision-making or legitimate disagreement over the "goals" of Subdistrict Superintendent. The Court of Appeals did not disturb this finding. Selch v. Letts, 5 F.3d at 1043.

Instead, both the District Court and Court of Appeals embraced a broad view of the role of politics in the implementation of policy. Id., 1045. The courts below focused upon whether an opposition party member could "reasonably" serve to thwart the policy goals of the party in power while serving in a particular position. These courts appear to have concluded that discharge on the basis of partisan politics is justified if the image of the incumbent party could be adversely affected merely by the failure to properly perform job duties which are not affected by political considerations.

This approach conflicts with both the analyses and outcome presented in the remarkably similar case of Akers v. Caperton, 998 F.2d 220 (4th Cir. 1993), which dealt with the position of maintenance superintendent with the West Virginia Department of Highways. The Seventh Circuit Court of Appeals noted this conflict in its opinion. Selch v. Letts, 5 F.3d at 1045.

ARGUMENT

The recognition that handing out "political spoils" following a party-line change in administration conflicts with First Amendment Rights of freedom of speech and expression, has not led to any easily applied rules to determine what constitutes impermissible political patronage, Elrod v. Burns, 427 U.S. 347 (1976), as opposed to a legitimate effort to simply install political allies of the "in-party" in government's most sensitive jobs. See, e.g., Wilbur v. Mahon, 3 F.3d 214 (7th Cir. 1993). In this case, both the District Court and Court of Appeals held that it was proper to replace John Selch, a highway subdistrict superintendent because of his political affiliation even though:

> At least in terms of Mr. Selch's communications with his superiors, it would be a stretch to say that his job entailed "meaningful input into government decision making." Except for the information he supplied in conjunction with the budgeting process, there was little evidence that he was relied upon to provide critical information or other "input" to the hierarchy of the highway department. Moreover, if the term "goals" is broadly construed, there was little room for disagreement over Mr. Selch's goals. Broadly put, Mr. Selch's goal was simply to insure that the road construction and maintenance work in his subdistrict was effectively and speedily undertaken. (Citations omitted).

Selch v. Letts, 5 F.3d at 1043. Nevertheless, both courts condoned Selch's discharge on the basis of his political affiliation.

The opinions of both the District and Appellate Courts are flawed because they focus almost exclusively on the fact that Selch was a "critical and highly visible representative of the state administration . . .", Id. at 1047, even though the only threats to the administration's objectives Selch could pose would result from insubordination or poor job performance, or some other conduct which would allow discharge for cause.

Police officers, bus drivers, and even state office telephone operators or tour guides are all critical and highly visible employees. "However, no one would seriously argue that these positions are outside Elrod and Branti's protection." Akers v. Caperton, 998 F.2d 220, 225 (4th Cir. 1994).

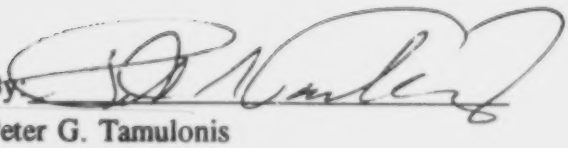
In examining Selch's significant job responsibility, (e.g., 60 subordinate employees and a $1,000,000 budget), the Seventh Circuit Court of Appeals strays away from the determinative factor of whether "there is a rational connection between shared ideology and job performance." Savage v. Gorski, 850 F.2d 64, 68 (2d Cir. 1988) (emphasis added).

The Court of Appeals for the Fourth Circuit made no such mistake when it stated: "[L]ittle persuasive force attends a contention that [deciding which pothole should be filled first] requires a certain political affiliation in order to be effectively performed." Akers v. Caperton, 998 F.2d at 225 (paraphrasing: Abraham v. Pekarski, 537 F.Supp. 858, 865 (E.D. Pa. 1982) aff'd in part and rev'd in part, 728 F.2d 167 (3d Cir.) cert. denied, 467 U.S. 1242. The Seventh Circuit has acknowledged the factual similarity with Akers and the conflict with the Fourth Circuit in legal analysis. Selch v. Letts, 5 F.3d at 1045. This conflict between the circuits should be resolved.

An end to the mounting "shambles" of "inconsistent and unpredictable results" in political affiliation cases referred to by Justice Scalia and noted by the Seventh Circuit in this case, Selch, 5 F.2d at 1047, quoting Rutan v. Republican Party of Illinois, 497 U.S. 62, 111-12 (1990), will only come when this Court again affirms the principles of Elrod v. Burns and limits political firings only to positions where a rational relationship between party affiliation and job performance is manifest.

CONCLUSION

Petitioner John Selch respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit.

By: 

Peter G. Tamulonis
Counsel of Record
John B. Drummy
Briane M. House
KIGHTLINGER & GRAY
660 Market Square Center
151 North Delaware St.
Indianapolis, Indiana 46204
(317) 638-4521

Counsel for Petitioner.